(23)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 947

ARCHIE C. DAVIS,

Petitioner,

—*against*—

SHELL UNION OIL CORPORATION,
ASIATIC PETROLEUM CORPORATION,

Defendants,

—and—

COMPANIA de PETROLEO SHELL de COLOMBIA;
N. V. KONINKLIJKE NEDERLANDSCHE MAATSCHAPPIJ TOT EXPLOITATIE VAN PETROLEUMBRONNEN IN NEDERLANDSCHE-INDIE (ROYAL DUTCH COMPANY FOR THE WORKING OF PETROLEUM WELLS IN THE NETHERLANDS INDIES);
THE SHELL TRANSPORT & TRADING COMPANY, LTD.;
N. V. de BATAAFSCHE PETROLEUM MAATSCHAPPIJ (THE BATAVIAN PETROLEUM COMPANY);
THE ANGLO-SAXON PETROLEUM COMPANY, LTD.; and
ASIATIC PETROLEUM COMPANY, LTD.,

Respondents.

PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Law Brief Press—NYC

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To the Honorable, The Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petition of Archie C. Davis respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved.

The petitioner brought this action at law in the United States District Court for the Eastern District of New York against the six respondents herein and the two other defendant corporations, Shell Union Oil Corporation and Asiatic Petroleum Corporation, for $380,000. damages on one cause of action for breach of contract, and for $25,000. damages on a second cause of action based upon misrepresentation. The two formal agreements upon which the action is based, copies of which are annexed to the complaint (R. 12-18 and 20-22), were executed in New York City by respondent Shell Colombia. That respondent is alleged to have executed these two contracts both on its own behalf and as the agent and instrumentality of each of the seven other defendants, each of which participated in the negotiations leading up to the execution thereof (R. 8).

Shell Union Oil Corporation and Asiatic Petroleum Corporation, both Delaware corporations, admittedly doing business in New York, appeared and answered. The remaining six defendants, the respondents herein, joined in a motion to vacate the service of process upon them on the grounds (1) that the Court had no jurisdiction over their persons, and (2) that the individuals upon whom process was served were not agents upon whom service could validly be made. The District Court (Abruzzo, *J.*) granted the motion and wrote a lengthy opinion (R. 34-49), and on November 20, 1943 an order and judgment (R. 22-24) was entered vacating the service of the summons and complaint upon the respondents and dismissing the action as to them for lack of jurisdiction over their persons.

An appeal was taken (R. 25-26) by the petitioner from the said order and judgment to the United States Circuit Court of Appeals for the Second Circuit, and the respondents moved to dismiss the said appeal (R. 1-2) upon the

ground that the decision of the District Court is not a final appealable decision within the meaning of the Judicial Code, Section 128 (28 U. S. C. §225). On February 11, 1944, the Circuit Court of Appeals (Swan, Chase and Clark, *JJ.*) rendered a decision upon this motion as follows (R. 26):

> "Motion to dismiss granted on authority Hohorst v. Hamburg Am. Packet, 148 U. S. 262; Atwater v. No. Am. Coal Corp., 111 F. (2d) 125 (C. C. A. 2)."

An order of the said Circuit Court of Appeals, dated March 2, 1944 (R. 49), was filed that day, dismissing the petitioner's said appeal. This petition is for writ of certiorari to review that order.

Jurisdictional Statement.

Jurisdiction is conferred upon this Court to review the order of the Circuit Court of Appeals, by Section 240 (a) of the Judicial Code (28 U. S. C. §347).

The said order has denied petitioner the right to appeal from the District Court judgment finally dismissing the action against all but two of eight defendants on the ground it lacked jurisdiction over their persons. This decision involves a substantial question, and is in conflict with the decisions of another Circuit Court of Appeals on the same matter, and is also probably in conflict with applicable decisions of this Court. Moreover, the decision cannot be reconciled with the accepted and usual course of judicial proceedings and therefore calls for an exercise by this Court of its power of supervision (Supreme Court Rule 38, par. 5 [b]).

The Question Presented.

The question presented to this Court is whether an order and judgment of the District Court, which finally dismissed this action against six of the eight defendants (the only six defendants who had made jurisdictional objections) on the ground that the Court lacked jurisdiction of their respective persons, and thereby finally determined a controversy between the plaintiff and the said defendants which was wholly separate and apart from the causes of action asserted against the two remaining defendants, is final and appealable within the meaning of Section 128 of the Judicial Code (28 U. S. C. §225).

Reasons Relied on for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals for the Second Circuit is probably in conflict with the following applicable decisions of this Court:

Hill v. *Chicago & Evanston Railroad Co.*, 140 U. S. 52;
Clark v. *Williard*, 292 U. S. 112;
United States v. *River Rouge Improvement Co.*, 269 U. S. 411;
Reeves v. *Beardall*, 316 U. S. 283.

2. The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the following decisions of another Circuit Court of Appeals on the same matter:

Thompson v. *Murphy*, 93 F. (2d) 38 (C. C. A. 8th, 1937);
Moss v. *Kansas City Life Insurance Co.*, 96 F. (2d) 108 (C. C. A. 8th, 1938).

3. If this Court should conclude that the decision of the Circuit Court of Appeals for the Second Circuit does not

conflict with the decisions of this Court cited in paragraph 1 above, then the order of which review is sought herein constitutes a decision of an important question of federal appellate jurisdiction which has not been, but should be, settled by this Court.

4. The Circuit Court of Appeals for the Second Circuit has decided an important question of federal law regarding its appellate jurisdiction in a manner which has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

5. The Circuit Court of Appeals for the Second Circuit has so strictly construed the extent of the appealability of orders of the District Court as to violate the purpose of appellate courts and the intent of the statute governing the same, and to deprive the petitioner of a review of an order of the District Court which involves a very substantial right.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Honorable Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated: April 24, 1944.

SAMUEL B. STEWART, JR.,
GEORGE C. DIX,
Counsel for Petitioner.

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Opinions of Courts Below.

The opinion of the District Court for the Eastern District of New York upon granting the order which was the

subject of the appeal dismissed by the Circuit Court of Appeals has not yet been officially reported, but it is printed in full in the record (R. 34-49). Similarly, the three-line per curiam opinion of the Circuit Court of Appeals for the Second Circuit dismissing the petitioner's appeal from the District Court judgment has not yet been officially reported, but is printed in the record (R. 26).

Jurisdiction of This Court.

The jurisdiction of this Court is invoked pursuant to Section 240(a) of the Judicial Code (28 U. S. C. §347).

The decision of the Circuit Court of Appeals herein is, in our view, in conflict with decisions of this Court, discussed in Points I and II, *infra*, and of another Circuit Court of Appeals, discussed in Point IV, *infra*, on the same matter. If not in conflict with the said decisions, it has disposed of an important question of federal appellate jurisdiction which has not been, but should be, settled by this Court, and it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision (Supreme Court Rule 38, par. 5 [b]).

The order of the Circuit Court of Appeals (R. 49) to be reviewed herein is dated and was filed March 2, 1944, and the judgment of the District Court, from which the petitioner's appeal was dismissed, was entered in said Court on November 20, 1943 (R. 24).

Statement of the Case.

The material facts of the case are stated in the foregoing petition, and in the interest of brevity are not repeated here.

Specification of Errors.

The Circuit Court of Appeals for the Second Circuit erred:

(1) In making the order dated March 2, 1944, granting the respondents' motion to dismiss the petitioner's appeal from the District Court judgment, which had finally dismissed the complaint for want of jurisdiction, as to all six defendants who attacked jurisdiction.

(2) In holding that the said judgment of the District Court herein was not a final judgment, within the meaning of Section 128 of the Judicial Code (28 U. S. C. §225).

ARGUMENT

POINT I.

Section 128 of the Judicial Code (28 U. S. C. §225) does not call for the narrow interpretation of the requirement of finality placed upon it by the Second Circuit Court of Appeals, and that Court's ruling herein is inconsistent with the intent of the statute.

Since their creation in 1891, the Circuit Courts of Appeals have possessed "appellate jurisdiction to review by appeal *final decisions*" Judicial Code, §128 (28 U. S. C. §225). The meaning of the phrase "final decisions" has been the subject of many critical studies and conflicting views. See Crick, *The Final Judgment as a Basis for Appeal,* 41 Yale L. J. 539; and Note, *Finality of Judgments in Appeals from Federal District Courts,* 49 Yale L. J. 1476. A leading authority (3 *Moore's Federal Practice,* pp. 3391-2) has said that:

> "* * * Many attempts at setting out the essentials of finality have been made by courts and text writers. But the most which can be safely said of a final judgment is that it must be determinative of the controversy in respect of which it is given. A judgment may be final, where some of the issues have been separated from the main suit and determined without reference to the proceedings in the main suit. * * *"

There appears to be general agreement, however, that the so-called "final judgment rule" was designed only to avoid "the necessity of examining successive appeals or writs of error in the same case" (*Heike* v. *United States*, 217 U. S. 423, at p. 430) and to forbid "piecemeal disposition on appeal of what for practical purposes is a single controversy" (*Cobbledick* v. *United States*, 309 U. S. 323, at p. 325).

Economy of appellate review is both understandable and desirable, especially in this Court which is *the* court of final judgment. But when a Circuit Court of Appeals distorts the statutory rule, as heretofore applied by this Court, to a degree which violates the intent of its authors by making the procedure for obtaining a final determination of the suit *more* cumbersome and time-consuming rather than *less*, and when it expresses the opinion that it is authoritatively bound to do so, the time has come, we submit, for this Court to re-examine the basis of the interpretation.

The judgment of the District Court herein has put an end to this litigation with respect to six defendants, the respondents herein. As to them nothing further remains. The Court below has finally determined the controversy as to whether or not they are doing business in this jurisdiction, a controversy in which the other two defendants did not join. The learned Court below has held that it is precluded from reviewing the District Court's judgment, pre-

sumably because it believes such a review would invite "successive" appeals.

Actually, if that Court should now review the District Court judgment and reverse, a single trial would proceed as to all eight defendants. On the other hand, if an appeal does not lie now, a trial will proceed as to only two defendants and a judgment on the merits one way or the other may be obtained a year or two hence. Then, on the Circuit Court's theory, there will be two appeals before it, one on the merits as to two defendants and one on jurisdiction only as to six defendants. The petitioner may or may not be the appellant on both appeals. Whoever the appellant may be, the result will then be "final" and on the merits as to two defendants, but it cannot then be any more "final" as to the other six defendants than it is today. If the jurisdictional judgment as to the six respondents should then be reversed, back to the District Court go the plaintiff and the six respondents for a second trial. Then, after a judgment on the merits, up to the Circuit Court of Appeals we go again. Questions: (1) Whose time is being saved? (2) How is the cause of justice and economy of review being advanced? The Circuit Court has at least as much work to do. The District Court has more.

Even one trial of this action will take longer than the average, and the time and expense of parties and counsel is doubled by two trials. Much of the evidence against the six respondents will be the same as the evidence against the two defendants who have appeared. But under the decision of the Circuit Court of Appeals it may have to be presented twice and reviewed twice on appeal.

Hohorst v. *Hamburg-American Packet Co.*, 148 U. S. 262, cited in the decision below, involved the appellate jurisdiction of *this* Court to review "judgments or decrees" and not the jurisdiction of a circuit court of appeals to review "final decisions". It also was concerned with a complaint which

specifically alleged "joint" liability (see *infra* pp. 14-15). But even if the *Hohorst* case and the construction placed by it upon the statute there involved were deemed controlling here, their application to the facts of this case would not only violate orderly procedure but would depart from the trend of later decisions of this Court in favor of the expeditious hearing of appeals from judgments which terminate the action as to a particular and separable phase thereof, or as between all parties to such a separable phase:

Reeves v. *Beardall,* 316 U. S. 283: Judgment dismissing one of three counts in complaint held final and appealable.

Clark v. *Williard,* 292 U. S. 112: Determination in insolvency proceedings held final where disputed claims of title as between liquidator and judgment creditors were disposed of although case had been remanded for further judicial proceedings as to controversies between liquidator and others not parties to appeal.

Lamb v. *Cramer,* 285 U. S. 217: Judgment dismissing a civil contempt proceeding for want of jurisdiction, held final and appealable, although brought solely in aid of an equity suit which had not been finally determined.

Wilson v. *Republic Iron & Steel Co.,* 257 U. S. 92: Judgment dismissing an action for the plaintiff's failure to pay costs held final although "it leaves the merits undetermined and may not be a bar to another action" (257 U. S., at p. 96).

The simple statute here subject to interpretation was designed to prevent the very situation into which the Circuit Court of Appeals has now thrust the parties to this action. This Court surely cannot now sanction such misconstruction.

POINT II.

The District Court judgment, which has finally determined a controversy distinct from the general subject-matter of the litigation and as between all the parties to such controversy, is final and appealable.

In determining the finality and appealability of lower court decisions, this Court has always recognized that there may be independent judicial review of a final determination of some matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, without awaiting the termination of the entire litigation. *Hill* v. *Chicago & Evanston Railroad Co.*, 140 U. S. 52; *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411; *Clark* v. *Williard*, 292 U. S. 112.

In this case the District Court has decided that six of eight defendants (the respondents herein) may not be sued in New York on the ground that they are not doing business there (R. 48-49). The determination of this jurisdictional controversy, which is wholly independent of the general subject of the litigation, is final and complete. The respondents have been permanently relieved of any legal responsibility in the forum of this litigation. So far as they are concerned, "there is nothing more to be decided." cf. *Clark* v. *Williard, supra,* 292 U. S. 112, at p. 118.

The present status of this action may well be described by the language of this Court in *Hill* v. *Chicago & Evanston Railroad Co., supra,* 140 U. S. 52, which involved an appeal from a decree dismissing the suit as to certain defendants for want of equity. In accepting jurisdiction of the appeal, the Court held the decree to be final, even though the case was still open below with respect to another issue affecting the remaining defendants. The undetermined issue was, in the Court's words:

"* * * a severable matter from the other subjects of controversy and did not affect their determination. The fact that it was not disposed of did not change the finality of the decree as to the defendants against whom the bill was dismissed; * * *. They were no longer parties to the suit for any purpose. * * * All the merits of the controversy pending between them and the complainant were disposed of, and could not be again reopened, except on appeal from that decree. * * *" (140 U. S., at p. 54).

So in this case, an appeal from the District Court's judgment is the only remedy available to the petitioner against the six respondents. The case falls within the rule enunciated in *United States* v. *River Rouge Improvement Co., supra,* 269 U. S. 411, at p. 414, that:

"* * * an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation."

POINT III.

The cases relied upon by the Circuit Court of Appeals below are not applicable to this case.

Only two authorities were cited by the learned Court below: *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262, and *Atwater* v. *North American Coal Corp.*, 111 F. (2d) 125 (C. C. A. 2d, 1940). The former, it is submitted with the utmost respect, is wholly distinguishable from this case, both on the statute subject to interpretation (*supra*, p. 10), and on the facts. The latter is one of the Second Circuit's own earlier decisions which also apparently adopted a narrow, legalistic interpretation of the rule of the *Hohorst* case, without regard to practical consequences.

The *Hohorst* case involved a bill filed against a German corporation and five individuals for infringement of a patent. After all defendants had appeared generally, the complainant amended his bill (1) to insert the word "jointly" in the allegation which recited the defendants' infringement, and (2) to charge the individual defendants with being copartners and local agents and managers of the foreign corporate defendants (148 U. S., at p. 263). The corporation thereupon obtained an order that unless the complainant withdrew his amended complaint as to it and stipulated to go to trial against it on the original complaint, its notice of appearance would be amended into a special appearance, service of the subpoena set aside, and the complaint dismissed as against the said defendant (38 Fed. 273). The complainant stood his ground; the bill was dismissed as to the corporation, and the complainant appealed directly to this Court. In dismissing the appeal, this Court held the decree below was not final, and expressly distinguished the rule enunciated in *Hill* v. *Chicago & Evanston Railroad Co.*, *supra*, 140 U. S. 52, that final decisions as to separable controversies are appealable, saying (148 U. S. at p. 266):

"* * * But this case presents no such aspect. Complainant insisted, by his amended bill, that the alleged liability was joint, and that 'all the defendants have cooperated and participated in all the said acts and infringements.'"

The *Hohorst* complaint thus expressly charged *joint* liability. In this case, the petitioner has made no such charge. He has, for the sake of convenience, joined in a single lawsuit eight defendants, as to each of which *several*, as distinguished from joint, liability is alleged (R. 26-32). The several character of the alleged liability was utterly ignored by the Court below.

In this case, the complaint is more analogous to that in *Curtis* v. *Connly*, 264 Fed. 650 (C. C. A. 1st, 1920), aff'd. 257 U. S. 260, which involved a suit by the receiver of a national bank charging former directors with personal liability for losses. The court rejected a contention that a decree in favor of six out of twenty-one defendants was not final, saying (264 Fed., at p. 651):

"* * * We think this contention is without merit. On the allegations of the bill, each defendant is under a separate liability, and a separate action of law might have been brought against him. The decree in favor of these six defendants is therefore a final decree, from which an appeal lies under the statute. U. S. Comp. Stat. 1916, §1120; Hill v. Chicago, etc., R. R., 140 U. S. 52, 11 Sup. Ct. 690, 35 L. Ed. 331. *We agree with counsel for the plaintiff that each defendant is under a several liability; that, in effect, we are dealing with 21 lawsuits combined into one equity suit.*" (Italics supplied.)

The decision of the Circuit Court of Appeals here holds, in effect, that an action joint in form only is therefore joint in substance.

POINT IV.

The existing conflict among the decisions of the Circuit Courts of Appeals should be resolved by this Court in accordance with the principles announced in *Reeves* v. *Beardall*.

The position taken in this case by the Second Circuit Court of Appeals is inconsistent with that of *Thompson* v. *Murphy*, 93 F. (2d) 38 (C. C. A. 8th, 1937). The Court there accepted jurisdiction of an appeal from an order quashing the service of process as to all but two of the defendants, who appeared generally and filed answers. The Court observed that "The order appealed from completely determines the rights of the parties affected by it," and that "the defendants who are affected are not claimed by the plaintiff to be jointly liable with the answering defendants" (93 F. [2d], at p. 40). The Court does not appear, however, to have attached much importance to the question of joint liability, in view of the following statement (93 F. [2d], at p. 40):

> "* * * The controversy here is wholly between the appellant and the appellees over *the question of the jurisdiction of the court below, a question which is collateral to and separate and distinct from the subject of the litigation* and does not affect the answering defendants. *There is no reason why a review of the order should have to await the outcome of the trial of this suit in the court below as to the answering defendants, and every reason why it should not.* There should be but one trial of this case upon its merits as to all defendants." (Italics supplied.)

See also, *Moss* v. *Kansas City Life Ins. Co.*, 96 F. (2d) 108 (C. C. A. 8th, 1938).

Indeed, a degree of scholarly doubt appears to exist within the Second Circuit Court of Appeals itself, as that bench is presently constituted. See *United States* v. *243.22 Acres of Land,* 129 F. (2d) 678 (C. C. A. 2d, 1942):

> "'Final' is not a clear one-purpose word; it is slithery, tricky. It does not have a meaning constant in all contexts." (Frank, *J.,* 129 F. [2d], at p. 680.)

See also, Note, 3 *Moore's Federal Practice,* 1942 Supplement, pp. 123-133, and the cases cited therein; *Collins* v. *Metro-Goldwyn Pictures Corp.,* 106 F. (2d) 83 (C. C. A. 2d, 1939), analyzed in Note 49 *Yale L. J.* 1476.

The most recent example of the modern trend is the enlightened holding of this Court in *Reeves* v. *Beardall,* 316 U. S. 283, upholding appealability of a judgment dismissing one of three counts. This Court's unanimous opinion commented (316 U. S., at p. 285):

> "* * * Such a separate judgment will frequently be a final judgment and appealable, though no disposition has been made of the other claims in the action. Bowles v. Commercial Casualty Ins. Co., 107 F. 2d 169, 170. That result promotes the policy of the Rules in expediting appeals from judgments which 'terminate the action with respect to the claim so disposed of', though the trial court has not finished with the rest of the litigation. * * *"

The finality of the District Court's judgment in the instant case was also no less complete as to the six respondents than was the finality of the ruling reviewed by this Court in *Rosenberg Co.* v. *Curtis Brown Co.,* 260 U. S. 516, with respect to the single defendant involved in that case.

The conflict between the Eighth Circuit decisions and the view of three learned members of the Second Circuit, as

expressed in this case and in *Atwater* v. *North American Coal Co., supra,* 111 F. (2d) 125, should be resolved in favor of appealability and a practical interpretation of the statute, which is consistent with its intent and with the modern trend of the decisions.

A clarification by this Court of the conflict and confusion which exists today in this division of appellate jurisdiction, and a reaffirmation of the original practical theory and purpose of the "final decision rule", with which the Second Circuit view is not consistent, would save the time and resources of countless litigants and their counsel and of the courts themselves. Even if this Court should believe the *Hohorst* case stands between this petitioner and orderly and reasonable procedure, which it is respectfully submitted it does not, the repudiation of that decision at this time will be consistent with the high purpose of this Court and the pragmatic necessities of modern times.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise of this Court's supervisory powers, in order that a vital question of federal appellate jurisdiction may be settled, and that to such an end a writ of certiorari should be granted and this Court should review the determination dismissing petitioner's appeal herein and finally reverse it.

Dated: April 24, 1944.

Respectfully submitted,

SAMUEL B. STEWART, JR.,
GEORGE C. DIX,
Counsel for Petitioner.

APPENDIX

Statute cited

28 United States Code §225 (Judicial Code §128) Appellate Jurisdiction:

"(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

"First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.

"Second. In the United States District Courts for Hawaii and for Puerto Rico, in all cases. * * *"

(24)

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WM. DWIGHT WHITNEY,
Counsel for Respondents.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

ARCHIE C. DAVIS,
Petitioner,

against

SHELL UNION OIL CORPORATION,
ASIATIC PETROLEUM CORPORATION,
Defendants,

and

COMPANIA DE PETROLEO SHELL DE COLOMBIA; N. V. KONINKLIJKE NEDERLANDSCHE MAATSCHAPPIJ TOT EXPLOITATIE VAN PETROLEUMBRONNEN IN NEDERLANDSCHE-INDIE (ROYAL DUTCH COMPANY FOR THE WORKING OF PETROLEUM WELLS IN THE NEDERLANDS INDIES); THE SHELL TRANSPORT & TRADING COMPANY, LTD.; N. V. DE BATAAFSCHE PETROLEUM MAATSCHAPPIJ (THE BATAVIAN PETROLEUM COMPNY); THE ANGLO-SAXON PETROLEUM COMPANY, LTD.; and ASIATIC PETROLEUM COMPANY, LTD.,
Respondents.

No. 947

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The decisions below are unreported. The order of the Second Circuit Court of Appeals dismissing the appeal appears at R. 49, and the decision of said Court appears at R. 26. The opinion of the District Court appears at R. 34-49.

The petitioner invokes the jurisdiction of this Court under § 240-(a) of the Judicial Code (28 U. S. C. § 347).

STATEMENT OF THE CASE

The question is whether the complaint alleges joint liability on the part of the six defendants-respondents and of the two defendants who have answered and remain in the case.

The defendants-respondents are companies of Great Britain, The Netherlands, and the Republic of Colombia. The defendants which have answered are American corporations.

(a) The Complaint

No distinction is made in the complaint between the defendants. The theory of the complaint is that all eight constitute one so-called "Group"; that the whole Group acts together as one, with two members in control and the other six acting as "agents and instrumentalities". The District Court similarly construed plaintiff's complaint as charging joint liability (R. 35).

This idea is carried through the complaint with compelling persistence. At par. 11 (R. 6) the name of "Royal Dutch-Shell Group" is chosen by the pleader for all eight companies. At pars. 7 and 8 (R. 5) Royal Dutch (of The Netherlands) and Shell Transport (of Great Britain) are identified as the grand-parent corporations "who jointly own or control" the stock, assets and business of Batavian (of The Netherlands) and Anglo-Saxon and Asiatic *Ltd.* (both of Great Britain).[1] These three parent corporations are then alleged to have conducted their business in part through the two American corporations which remain in

[1]Emphasis ours throughout.

the case (Shell Union and Asiatic Petroleum *Corporation*) and in part through Shell Colombia (the Colombian corporation), as their "agents and instrumentalities", par. 9 (R. 5-6), whom they "dominate and control", par. 10 (R. 6). The "agent and instrumentality" conception recurs in pars. 12, 15, 19 and 21 (R. 6-8). At par. 13 (R. 6-7) we are told that it "is the practice of the Royal Dutch-Shell Group ***and each*** of the members thereof to transact business from their headquarters in London, England * * * and to negotiate and execute all contracts made in the State of New York * * * ***through the agency*** of an officer or director of Asiatic Petroleum Corporation or Shell Union, or a specifically authorized attorney in fact".

The main theme recurs in the detailed descriptions. The individual New York negotiators for the defendants are said to act "pursuant to authorization from the Royal Dutch-Shell *Group*", par. 17 (R. 7), and to represent that they are "authorized by the Royal Dutch-Shell *Group*", par. 18 (R. 7). Shell Colombia then executes the contract in suit, and performs the acts under it, "as the agent and instrumentality of the Royal Dutch-Shell Group", par. 21 (R. 8).

The plaintiff tells us that he himself made his demands "of *the defendants*", and that "the defendants, *including* Shell Colombia, failed and refused" to comply therewith, par. 25 (R. 8). Again, "the defendants" requested modifications of the agreement, and used "*their* authorized agents" to make representations to the plaintiff, par. 27 (R. 8-9). When modifying agreements came to be made, it was "*the defendants*" who "urged" and "agreed" to them, pars. 28, 30 (R. 9).

Finally, it is "by reason of the foregoing acts *of the defendants*" that the plaintiff has been damaged, par. 34 (R. 10).

In the second cause of action,—for alleged misrepresentation,—all of the allegations in pars. 1 to 29 are repeated, par. 35 (R. 10); and it is again "the defendants", acting through their aforesaid individual representatives, who made the alleged fraudulent representations.

(b) Summary

The petitioner has stated his position beyond equivocation.

He might have made his claim against either or both of the American corporations—Shell Union and/or Asiatic *Corporation*. Indeed, his case is now at issue with both of them.

He might alternatively have made his claim only against Shell Colombia,—which he alleges to have made the agreement in suit, relating as it does exclusively to lands in the Republic of Colombia[2],—oil leaseholds in the Department

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[2]We do not see why the Republic of Colombia is not the appropriate forum for the whole case. The question involves titles to lands in that Republic. The plaintiff, apparently an American speculator in Colombian property, sold options thereon to the Colombian corporation (Shell of Colombia), and apparently actually received from it $52,000 in cash, par. 33 (R. 10), and Exhibit "A" (R. 13). But apparently the titles did not satisfy the optionee, so that in the end the plaintiff had received, and Shell of Colombia had spent, upwards of $50,000, but the plaintiff still held the lands. Much is said of geological and geophysical examinations and explorations of the premises, par. 27 (R. 8-9) and pars. 36 and 37 (R. 10-11), as well as of the validity of title, par. 26 (R. 8). We submit that there would not be a gross miscarriage of justice if eventually it should prove necessary to try these issues in the Courts of the sister Republic in which both the plaintiff and defendants evidently had launched their enterprises.

of Magdalena, known as Torcoroma, Roman, Mosquitos and Monte Cristo, par. 14 (R. 7).

Or he might have elected to sue only the Royal Dutch and Shell Transport Companies, regarding them (as he evidently does) as the ultimately controlling grand-parents.

Or finally, he might have selected what he designates as the three intermediate parents,—The Batavian Company of The Netherlands and the Anglo-Saxon and Asiatic *Ltd.* companies of Great Britain.

In short, it was for him to decide what he considered his claim or controversy, and with whom. He has elected to make his claim a joint one, and the only question is as to the legal consequences which attach to that election.

ARGUMENT ON THE LAW

I

IT IS SETTLED LAW IN THIS COURT THAT THE DISMISSAL OF ONE OF SEVERAL PARTIES NAMED JOINTLY ON A SINGLE CLAIM OR CONTROVERSY DOES NOT CONSTITUTE A FINAL JUDGMENT.

(a) Authorities

The law was settled in *Hohorst* v. *Hamburg-American Packet Company,* 148 U. S. 262, a case not dissimilar to the present, in which a joint claim was made against a foreign corporation and its alleged agents in New York. The bill was dismissed as against the foreign corporation, but not as against the New Yorkers. The Court held that the appeal could not be maintained, because the decree in favor of the foreign corporation was not final.

This Court has had recent occasion to confirm the rule. *Reeves* v. *Beardall,* 316 U. S. 283. It was there explained that it is "differing occurrences or transactions, which form the basis of separate units of judicial action".

The quotation was taken by this Court from the concurring opinion of Circuit Judge Clark[3] in *Atwater* v. *North American Coal Corporation,* 111 F. (2d) 125, 126.

(b) Considerations of Policy

In the face of these authorities, we hardly think that comment from us can be of assistance. However, we may respectfully point out the practical common sense and judicial fairness of a rule which makes the distinction between

(i) Two different transactions or occurrences, giving rise to two different controversies or claims; and

(ii) Two defendants jointly alleged to have participated in precisely the same transaction or occurrence, giving rise to a single controversy or claim.

In the first type of case, a judgment on any of the claims or transactions is final as to that one, and leaves no more to be said in the Trial Court about it. An appeal is then appropriate.

In the other type of case, the Trial Court still has the single occurrence or transaction *sub judice;* and the policy of the Judicial Code against appeals "in fragments" becomes applicable.

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[3]Our case was decided by a bench consisting of Judges Swan, Chase *and Clark.*

The petitioner urges upon this Court that the doctrine, so firmly established and so recently repeated, should nonetheless be reviewed and overruled. But we respectfully submit that no considerations of public policy, of the character that sometimes warrant the overruling of previously established interpretations of procedural statutes, could possibly find their appropriate application in a case where the sole effect is to require a plaintiff, who has elected to sue two or more corporations (some domestic and some foreign) on the assumption that they jointly committed precisely the same act, to accept until the proper time for appeal a judgment of the District Court that there is no jurisdiction over the foreign corporations.

II

THERE IS NO CONFLICT OF CIRCUITS

The petitioner asks this Court to find a conflict in the decision of the Eighth Circuit Court of Appeals in *Thompson* v. *Murphy,* 93 F. (2d) 38. But the Court there obviously held that the defendants were not named as jointly liable. See, for example, the quotations which appear in the first column of 93 F. (2d) 40, and which are repeated in the following language of the Court in the second column on the same page, from *Standley* v. *Roberts,* 59 Fed. 836, 839:

> "* * * the order is reviewable under the rule of this court as 'a final decision which completely determines the rights in the suit * * * of some of the parties *who are not claimed to be jointly liable* with those against whom the suit is retained'."

The petitioner adds: "See also, *Moss* v. *Kansas City Life Ins. Co.*, 96 F. (2d) 108 (C. C. A. 8th, 1938)". The *Moss* case in fact provides further evidence that the Eighth Circuit Court of Appeals both understands the rule and understands it in the same way as the Second and other Circuit Courts of Appeals,[4] and is directly in point in our favor. There the plaintiff dropped all but three defendants from the case. The latter filed separate motions to quash. The motions of two of the defendants were sustained prior to that of the third. After the motion of the third defendant was sustained an order was entered dismissing the cause as to all three and an appeal was allowed from such order. A motion was made to dismiss the appeal of the first two defendants as out of time because their motions to quash were sustained more than three months before the allowance of the appeal. The Court held that the appeal was timely, as they were jointly liable with the third defendant, and therefore that their dismissal from the case did not constitute a final appealable judgment and that there could be no such judgment until the case was dismissed as to the third defendant. The opinion reviews the decisions in the *Hohorst* and related cases, and contains an authoritative interpretation by the Eighth Circuit Court of Appeals itself of the case relied upon by the petitioner here, *Thompson* v. *Murphy*, 93 F. (2d) 38, *supra*.

Respectfully submitted,

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May 19, 1944.

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[4] *Fields* v. *Mutual Ben. Life Ins. Co.*, 93 F. (2d) 559 (4 Cir.); *Hunteman* v. *New Orleans Public Service, Inc.*, 119 F. (2d) 465 (5 Cir.).